

## BREXIT AND TRADE ISSUES

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*This article explores the post-Brexit EU-UK trade relations as they can be anticipated on the eve of the approaching exit day on 31 October 2019. A key piece of the Brexit negotiation concerned the issue of future trade relations between the UK and the EU after the withdrawal. The first part of the article discusses the framework of EU-UK future trade relationship as it emerges through the stand taken by the parties during the negotiations and in the final acts, the Withdrawal Agreement and the Political Declaration. In its second part, the article focuses on WTO constraints to the UK post-Brexit international trade with third countries, including those with which the EU currently has trade agreements in place, which will become inapplicable to the UK upon its exit from the EU. The analysis shows that taking back control over the trade policy will not be an easy task for the UK, leaving the EU with or without a deal.*

**Keywords:** Backstop, Brexit, European Union, Northern Ireland, United Kingdom, World Trade Organization, Withdrawal Agreement, Political Declaration

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## I. INTRODUCTION

On 29 March 2017 the United Kingdom (UK) formally notified the European Council of its intention to leave the European Union (EU). In November 2018, before the end of the two-year time limit established by Article 50 TEU to achieve an agreement on the UK departing terms, the EU and the UK closed an intense negotiation with the signature of the Withdrawal Agreement and the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom.<sup>1</sup> A key piece of the Brexit negotiation concerned the issue of future trade relations between the UK and the EU after the withdrawal. However, as is well known, the UK Parliament has refused to accept the results of the negotiation. At the date of finalisation of this paper<sup>2</sup> it is not clear whether Brexit will occur with or without a deal – if at all.

The main initial target of the UK was to associate the negotiations on the terms of withdrawal with those concerning the two parties' future cooperation. However, at the EU's insistence the definition of the framework for the future trade relationship was pushed back to the very last phase of the negotiation and is not enshrined in a binding agreement but

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<sup>1</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1 144/1.

<sup>2</sup> This article was completed at the end of September 2019.

rather in a political declaration. The different positions of the parties converged in the Political Declaration, a non-binding legal instrument open to different interpretations and developments. The only trade arrangement binding for the parties is the so-called 'backstop' solution for avoiding a hard border between Ireland and Northern Ireland, agreed by the parties in the Protocol on Ireland/Northern Ireland that forms an integral part of the withdrawal agreement.<sup>3</sup>

In its first part, this article discusses the features of future EU-UK post-Brexit trade relations according to the positions manifested by the parties during the negotiation and in the final acts, taking into account the position adopted by Prime Minister Boris Johnson's government, notably with his letter to EU Council President Donald Tusk on 19 August 2019.<sup>4</sup> In its second part, the paper focuses on World Trade Organization (WTO) constraints to the UK's post-Brexit international trade with third countries, including those with which the EU currently has trade agreements in place which will become inapplicable to the UK upon exit. The so-called 'roll-over' – aimed for by the UK – of existing Free Trade Agreements (FTA) and other trade arrangements currently in place between the EU and third countries requires the conclusion of new agreements by the UK. They are meant to enter into force subject to the exit of the UK from the EU, the end of any Transition Period and the ability of the UK to conduct thereupon its own international trade policy freely. The latter is dependent on the UK not being encumbered by the restrictions stemming from the UK being part of a custom union with the EU, as currently envisaged by the 'backstop'.

The conclusions of our analysis show the considerable constraints that the UK faces in devising such a policy and entering into such agreements, including with countries such as the US which currently have no FTAs in place with the EU. Since the UK-EU trade represents for the UK about half

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<sup>3</sup> According to Article 182 of the withdrawal agreement, 'The Protocol on Ireland/Northern Ireland, the Protocol relating to the Sovereign Base Areas in Cyprus, the Protocol on Gibraltar, and Annexes I to IX shall form an integral part of this Agreement'.

<sup>4</sup> Letter of Prime Minister Boris Johnson to European Council President Donald Tusk (19 August 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/826166/20190819\\_PM\\_letter\\_to\\_His\\_Excellency\\_Mr\\_Donald\\_Tusk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826166/20190819_PM_letter_to_His_Excellency_Mr_Donald_Tusk.pdf)> accessed 6 September 2019.

of the total import-export of the UK<sup>5</sup>, the legal framework of this trade relationship affects the terms of any other agreement with other WTO members. As such, this represents a situation of uncertainty as to the future trade relations of the UK with the EU.

## II. THE NARROW PATH TOWARDS AN EU-UK ECONOMIC PARTNERSHIP POST-BREXIT

### *I. Past and future in the interpretation of Article 50 TEU: the separation of the trade negotiations*

Article 50 TEU does not draw a clear line between the undefined 'arrangements [...] for the withdrawal' to be included in a bilateral treaty between the Union and the exiting member, and 'the future relations' to be taken into account in the negotiation of the treaty.

This vague formulation of the provision allowed at the very beginning of the Brexit process two opposite lines of interpretation: either a comprehensive negotiation process, combining both the past and the future, or a negotiation trajectory defined by a clear separation between the assessment of the past and discussion on the future.

Prime Minister May's letter triggering Article 50 TEU expressed the will of the UK to negotiate and agree both the terms of separation and the future relations in parallel.<sup>6</sup> This proposal of the UK government met, however, with a firm opposition from the EU, based on the very terms of Article 50. The European Council's first Guidelines<sup>7</sup> split the negotiations in two

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<sup>5</sup> 'In 2018 the UK exported £289 billion of goods and services to other EU member states. This is equivalent to 46% of total UK exports. Goods and services imports from the EU were worth £345 billion (54% of the total)': House of Commons Library, Briefing Paper, 'Statistics on UK-EU trade', 7851, (24 July 2019) 4.

<sup>6</sup> Letter of Prime Minister Theresa May to European Council President Donald Tusk (29 March 2017) <<http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf>> accessed 19 August 2019.

<sup>7</sup> According to Article 50 TEU, the Union shall negotiate and conclude an agreement with the withdrawing state 'in the light of the guidelines provided by the European Council'. In the Brexit negotiation, the European Council adopted three set of Guidelines. The first one was adopted at the beginning of the process one month after the UK withdrawal notification: European Council Guidelines (April

phases: a first phase exclusively devoted to the arrangements for an orderly withdrawal and a second phase, conditioned by reaching sufficient progress and a satisfactory agreement on the first phase issues as assessed by the EU Council, devoted to achieving an overall understanding on the framework for the future relationship. The main EU legal justification was that an agreement on a future relationship between the EU and the UK would be 'finalised and concluded once the United Kingdom has become a third country'.<sup>18</sup> Behind the legal argument, there was the determination of the EU to subordinate the negotiations on the future to reaching an agreement on the three paramount objectives of the Article 50 negotiations: first, the protection of the rights of EU citizens presently residing in the UK and those of UK citizens living in the EU;<sup>9</sup> second, the settlement of the UK financial obligations towards the Union; and third, avoiding the re-establishment of an hard border between the Republic of Ireland and Northern Ireland.<sup>10</sup>

The roadmap proposed by the European Council was accepted by the UK. Indeed, in the Terms of Reference for the Article 50 TEU negotiations,<sup>11</sup> agreed by both parties, the issues on the table were the Citizens' rights, the Financial Settlement, other separation issues and a dialogue on Ireland/Northern Ireland. No mention was made as to the future relationship between the Union and the UK.

Legally speaking, the position of the EU was correct. According to Article 50, the withdrawal agreement is a sole Union agreement, concluded by a Council decision adopted by a qualified majority vote and subject to the consent of the European Parliament. An agreement on the future relationship falls within a different scope of the EU's external action, since the UK will forfeit its membership and become a third country. The agreement should have a different legal base: Article 207 TFEU in case future relationships were limited to trade matters, or Article 217 TFEU in case of a wider area of

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29 2017) EUCO XT 20004/17, para II <<http://data.consilium.europa.eu/doc/document/XT-20004-2017-INIT/it/pdf>> accessed 19 August 2019.

<sup>8</sup> Ibid para 5.

<sup>9</sup> See contribution by Catherine Barnard in this volume.

<sup>10</sup> See contribution by John Doyle & Eileen Connelly in this volume.

<sup>11</sup> Terms of Reference for the Article 50 TEU negotiations, <[https://ec.europa.eu/commission/publications/terms-reference-article-50-treaty-european-union-negotiations\\_en](https://ec.europa.eu/commission/publications/terms-reference-article-50-treaty-european-union-negotiations_en)> accessed 29 April 2019.

cooperation extended to EU policy areas other than trade and putting the base for deeper cooperation in the form of Association.<sup>12</sup>

## 2. *The EU and UK negotiations: trade in goods*

The first formal step towards a definition of a framework for the future relationship arrived only at the end of March 2018 when the European Council delivered the third set of Guidelines – delivered by the EU, rather than by the UK.<sup>13</sup> This does not mean that the UK did not engage in political discussion on the kind of economic and trade relations it intended to establish with the EU.<sup>14</sup> However, the British political elite was highly divided on the kind of future trade relation it sought with the EU, and the UK government only formalised its proposal in the White Paper commonly known as the Chequers plan in July 2018.<sup>15</sup> The time-lag uncovers the weak negotiating position of the UK.<sup>16</sup> When the 585-page Draft Agreement on the Withdrawal was agreed at negotiators' level on 14 November 2018, the common ground for the negotiation of the future relationship was outlined

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<sup>12</sup> Takis Tridimas, 'Article 50: An Endgame without an End?' (2016) *King's Law Journal* 297; Hannes Hofmeister, 'Should I Stay or Should I Go?' A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 *ELJ* 589; Christophe Hillion, 'Withdrawal Under Article 50 TEU: An Integration-Friendly Process' (2018) 55 *CML Rev* 29; Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A constitutionalist reading' (2017) 54 *CML Rev* 695.

<sup>13</sup> European Council Guidelines (March 23, 2018) EUCO XT 20001/18 (hereafter 2018 Guidelines) <<https://www.consilium.europa.eu/media/33504/23-euco-art50-guidelines-it.pdf>> accessed 19 August 2019.

<sup>14</sup> Prime Minister Theresa May, speech on our future economic partnership with the European Union, Guildhall (2 March 2018).

<sup>15</sup> White Paper of the UK Government on 'The future relationship between the United Kingdom and the European Union' (17 July 2018), Cm (9593), (hereafter Chequers plan) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786626/The\\_Future\\_Relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union\\_120319.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf)> accessed 19 August 2019.

<sup>16</sup> See contribution by Emily Jones in this volume.

in a seven-page document defining general principles and aspirations consistent with different forms of trade agreements.<sup>17</sup>

In the 2018 Guidelines, the European Council reaffirmed the Union's determination to build a close partnership with the UK, covering 'trade and economic cooperation as well as other areas, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy.'<sup>18</sup> Once again, it was left to the European Council to draw the road map and the formal outcome: 'the negotiations on the overall understanding of the framework for the future relationship [...] will be elaborated in a political declaration accompanying and referred to in the Withdrawal Agreement.'<sup>19</sup> In other words, no binding instruments for the future, just a political commitment from both parties. A free trade agreement (FTA) could be finalised and concluded only once the UK is no longer a Member State.

In response to the red lines laid down by Prime Minister Theresa May in her various political speeches,<sup>20</sup> the European Council adopted its own red lines for a future trade deal. They were: the UK cannot have all the benefits of membership of the single market without the corresponding obligations; the preservation of the integrity of the single market, meaning unity of the four freedoms and the exclusion for the UK to participate in the single market on a sector-by-sector base; the Union autonomy in its decision-making process; and the central role of the Court of Justice of the European Union.

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<sup>17</sup> Outline of the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland, as agreed at negotiators' level on 14 November 2018 <[https://ec.europa.eu/commission/sites/beta-political/files/outline\\_of\\_the\\_political\\_declaration.pdf](https://ec.europa.eu/commission/sites/beta-political/files/outline_of_the_political_declaration.pdf)> accessed 19 August 2019.

<sup>18</sup> 2018 Guidelines (n 9) 1.

<sup>19</sup> Ibid 3.

<sup>20</sup> Ending jurisdiction of the European Court of Justice in the UK; ending free movement of EU citizens into the UK; a fully independent UK trade policy; and no compulsory contributions to the EU budget. See Prime Minister Theresa May, Plan for Britain, including the 12 priorities that the UK government will use to negotiate Brexit, Lancaster House, London (17 January 2017); Prime Minister Theresa May, Florence speech: a new era of cooperation and partnership between the UK and the EU, Florence (23 September 2017).



According to the 2018 Guidelines, the FTA would cover trade in goods, trade in services and access to public procurement markets, investments and protection of intellectual property rights. Differently, in the long-awaited Chequers Plan, the UK proposed a bilateral free trade area for goods, proposing that it could be established without introducing border controls. The UK proposal was in line with the EU position expressed in the 2018 Guidelines in terms of avoiding tariffs and quotas, but differs in its approach to border controls. In the traditional dichotomy between customs unions and free trade areas defined by Art. XXIV of the GATT,<sup>21</sup> only a customs union in which Member States adopt a common external tariff eliminates the necessity of border controls on the origin of goods. The UK proposal was intended instead to conciliate the freedom of the UK to autonomously set its own tariff levels, as in a classical free trade area, with the avoidance at the same time of 'friction at the border' (as in custom unions), notwithstanding the possible introduction of tariffs, quotas, and checks for health and safety. This tailor-made new approach to trade in goods was elaborated not just to allow a smooth circulation of final products, but also to 'protect the uniquely integrated supply chains and "just-in-time" processes that have developed across the UK and the EU over the last 40 years.'<sup>22</sup> The two pillars of the UK proposal were two 'innovative' instruments: the Common Rulebook and the Facilitated Customs Arrangement (FCA).<sup>23</sup>

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<sup>21</sup> Article XXIV of the GATT is the provision allowing for regional integration exceptions. The most-favoured-nation (MFN) obligation (Art I GATT) can be derogated to permit the formation of customs unions and Free Trade Areas. In a customs union, the members must eliminate duties and 'other restrictive regulations of commerce' with respect to substantially all trade between them and they must apply substantially the same duties and other regulations of commerce to their external trade. According to the GATT definition, the customs union members are required to eliminate internal trade barriers as well as establish a common commercial policy. Differently, in a free trade area members are only required to eliminate internal trade barriers. See Michal Ovádek and Ines Willemyns, 'International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice' (2019) EJIL 363; 'Article XXIV of the GATT contains the most important contemporary legal definition of the concept of a CU in international law.'

<sup>22</sup> Chequers Plan (n 15) 13.

<sup>23</sup> Ibid 16ff and 89ff.



The Common Rulebook would set forth the agreed rules on standards for goods, including agri-foods. In the 'desiderata' of UK these common rules would enable the UK and the EU to reduce or avoid border checks on the basis that common standards were observed. The implementation of the common regulation at the domestic level should be sufficient to qualify the goods for FTA treatment, meaning the respect of standards and regulations and the UK origin. The same would happen for EU27 exports to the UK. This system would depend in large measure on customs declarations and returns made by firms given 'trusted trader' status, and on maximum use of modern technology. It would ensure interoperability between UK and EU supply chains, and avoid the need for manufacturers to run separate production lines for the separate markets. The EU would continue to lead the definition of standards and the 'UK would make an upfront choice to commit by treaty to ongoing harmonisation with the relevant EU rules, with all those rules legislated for by Parliament or the devolved legislatures'.<sup>24</sup>

The FCA would be the mechanism to allow the elimination of UK/EU border controls while permitting an independent UK international trade policy. According to the proposal, the UK would apply its own trade policy and tariffs to imports of goods intended for consumption in the UK, while for goods in transit for the EU that entered via the UK, the UK would apply the EU's tariffs and trade policy.<sup>25</sup> The FCA would aim to eliminate the need for customs controls for trade in goods from the UK to the EU, including customs declarations for tariff classification purposes, routine rules of origin requirements, and entry and exit declarations, since the UK would act as agent for EU customs authorities. It would mean that the UK would guarantee the integrity of the EU customs union, ensuring that tariffs are properly applied and collected, and that EU standards for goods entering the EU via the UK are respected.

The FCA proposal is unique in the context of international relations between sovereign entities. In fact, the system is founded on the outsourcing of a sovereign power (administration of customs) to another state. The UK was suggesting that the Union and its Member States give up their customs sovereignty to a third country, without reciprocity. The system would be

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<sup>24</sup> Ibid 8.

<sup>25</sup> Ibid 16.

based on a full trust in a soon-to-be third country. However, due to its ineffective implementation of customs controls on imports from third countries, the UK as a member of the EU has not proved to be reliable in taking action to prevent customs evasion. Following an OLAF report and a Commission inspection, it emerged that the UK has under-valuated a fraud scheme relating to the importation of textiles and footwear originating in China since 2007,<sup>26</sup> which has resulted in an infringement procedure pending against the UK.<sup>27</sup> Despite having been asked to take appropriate risk control measures, according to the Commission the UK failed to take action to prevent the fraud. The UK's infringement of EU legislation resulted in losses to the EU budget amounting to EUR 2.7 billion during the period from November 2011 until December 2017.<sup>28</sup>

It is not surprising that EU Chief Negotiator Michel Barnier rejected the UK proposal for a Facilitated Customs Arrangements, arguing that the EU could never agree to outsource any part of its customs administration to a non-Member State.<sup>29</sup> What would be the interest of a third country to improve the customs control on behalf of the EU and its financial interests? Without the incentive to reduce the national contribution to the EU budget and the pressure on UK taxpayers, and lacking the deterrent effect of the infringement procedure, what would be the UK's incentive to guarantee the correct implementation of foreign legislation? When the UK customs authorities will be requested to check the goods in transit for the EU, they may be tempted to facilitate trade with faster, seamless import procedures, instead of carrying out burdensome customs controls, in order to attract more traffic with fewer customs controls. As such, the implementation of a dual customs system by UK officials could create new loopholes originating from the different tariffs and trade policies. In fact, since in the aspirations

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<sup>26</sup> European Anti-Fraud Office (OLAF), 'The OLAF Report 2017', 26.

<sup>27</sup> *Commission v United Kingdom*, Case C-213/19.

<sup>28</sup> European Commission, Formal notice Art. 258 TFEU (8 March 2018) <[http://europa.eu/rapid/press-release\\_MEMO-18-1444\\_EN.htm](http://europa.eu/rapid/press-release_MEMO-18-1444_EN.htm)> accessed 29 April 2019; European Commission, Reasoned opinion Art 258 TFEU (24 September 2018) <[http://europa.eu/rapid/press-release\\_IP-18-5807\\_EN.htm](http://europa.eu/rapid/press-release_IP-18-5807_EN.htm)> accessed 29 April 2019.

<sup>29</sup> European Commission, Press statement by Michel Barnier following the July 2018 General Affairs Council (Article 50), STATEMENT 18/4626.

of the UK Government, the new UK trade policy should reduce the standards and the tariffs compared the current EU's ones,<sup>30</sup> it is easy to foresee frauds to unduly extend the FTA treatment to non-UK origin goods.

### 3. *The EU and UK negotiations: trade in services*

It is important to note that the Free Trade Area would not extend to services. The Chequers Plan, searching for different market access rights for service providers, relies on the provisions of the General Agreement on Trade in Services (GATS).<sup>31</sup> However, it does not accept one of its main principles, according to which FTAs are obliged to cover all modes of services supply and to have substantial sectoral coverage.<sup>32</sup> The guiding philosophy seems instead to be exiting the single market for services, in exchange for the UK being allowed to deconstruct single market principles of free movement of persons.<sup>33</sup> In fact, the proposal on services is a selective recourse to EU mutual recognition of professional qualifications legislation. This is done in order to reach more 'deep commitments' on market access and national treatment, to guarantee that foreign service providers are treated the same as equivalent local providers, with any exceptions kept to a minimum only for the business services.<sup>34</sup>

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<sup>30</sup> 'Britain's destiny is to be a global champion of trading freedoms.' See the International Trade Secretary Liam Fox, 'Britain's place in the global trading system', policy Exchange, London (1 February 2019).

<sup>31</sup> The General Agreement on Trade in Services (GATS) is the only multilateral agreement regulating trade in services. It is one of the agreements administered by the WTO. Markus Krajewski, 'General Agreement on Trade in Services ([1994]2011)' Max Planck Encyclopedia of Public International Law [MPEPIL].

<sup>32</sup> In general, on service trade according to GATS rules in a post-Brexit scenario see Adlung, Rudolf, 'Brexit from a WTO/GATS Perspective: Towards an Easy Divorce?' (2018) 52 *Journal of World Trade* 721–744.

<sup>33</sup> The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons. In the EU internal market, the distinction is less important since the free circulation of persons allows all the modes. The end of the free movement of people between the UK and EU implies that the delimitation of trade of services is strictly connected to the conditions of circulation of services providers and recipients.

<sup>34</sup> Chequers Plan (n 15) 26.

The end of free movement of people risks becoming a barrier to trade in services by preventing businesses from having access to skills and talent, a crucial concern for a number of sectors, especially professional services, financial services and technology. The approach adopted by the Chequers Plan is to deal with the issue of mobility of skilled workers and professionals by using the framework of services trade, shifting the issue of access to skills and labour from the realm of free circulation of people and workers, to access to particular jobs in selected service sectors.

Concerning financial services, the Chequers Plan is based on abandoning the current system of 'passporting' based on the 'mutual recognition' principle covering many finance service areas as investments services, banking, insurance, insurance mediation, payment services and issuing electronic money. Instead, the UK proposal is to rely on a new economic and regulatory arrangement that is an expanded and modified version of the EU third-country equivalence regimes, which provide limited access for some of its third-country partners to some areas of EU financial services markets. The limit of equivalence is twofold: instability and lack of comprehensiveness.<sup>35</sup>

In the short run the UK regulatory regime will continue to be entirely equivalent to the one applicable among the EU27, but in the long run to maintain the equivalence means to negotiate standards and regulations with the EU, in view of the asserted autonomy of the UK to develop its own regulatory system. The White Paper proposes a number of processes designed to encourage continued convergence and to manage the process if the laws diverge, involving both parties. The regulatory autonomy also means the end of any supervisory control of EU organs, including the Commission and the European Supervisory Authorities, over the UK financial market and its actors.

The current EU equivalence framework does not apply to all EU regulated financial services. Access may depend on the type of clients (eligible counterparty, professional or retail) and regimes are different for cross-border operations and for established firms. From an EU legislative perspective, in order to expand the current equivalence regime into the new

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<sup>35</sup> Eddy Wymeersch, 'Third-Country Equivalence and Access to the EU Financial Markets Including in Case of Brexit' (2018) 4 *Journal of Financial Regulation* 211.

economic and regulatory arrangement proposed by the UK it would be necessary to recast a number of directives.

As such, the post-Brexit arrangement proposal on services seems as vague as it is unfeasible. It is completely blind to one of the EU's red lines, the integrity of the single market. As the EU Council recalled in its 2018 Guidelines:

the four freedoms are indivisible and that there can be no "cherry picking" through participation in the Single Market based on a sector-by-sector approach, which would undermine the integrity and proper functioning of the Single Market.<sup>36</sup>

*4. Trade matters covered in the Withdrawal Agreement: application to the UK of EU FTAs and the issue of the Irish border*

The Withdrawal Agreement is a complex treaty consisting in 185 articles structured in six Parts (further divided into Titles and Chapters), three Protocols and nine Annexes. The main goal of the agreement is to provide legal protection of the status and rights derived from EU law to EU and UK citizens and their families affected by the UK's withdrawal, and to define a financial settlement to assess the financial obligations undertaken while the UK was a member and still due.

As already highlighted, the Withdrawal Agreement does not deal with post-Brexit trade relations and therefore does not protect acquired economic rights of businesses. The uncertainties for the EU businesses trading with and operating in the UK, and for UK businesses trading with and operating in the EU, are only temporarily addressed by a short transition period (ending on 31 December 2020, with a possible extension for up to one or two years) of continuous application of the EU *acquis* to the UK. During this Transition Period the UK would not be participating in any EU institutions and agencies, although new EU rules would be applicable to the UK.<sup>37</sup>

As per Article 129, the EU *acquis* in force during the transition period includes the international agreements concluded by the EU, or by Member States

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<sup>36</sup> 2018 Guidelines (n 13) 3. For a critical approach to the indivisibility of the four freedoms, see Catherine Barnard, 'Brexit and the EU Internal Market' in Federico Fabbrini (ed) *The Law & Politics of Brexit* (Oxford University Press 2017) 203.

<sup>37</sup> See contribution by Kenneth Armstrong in this volume.

acting on its behalf, or by the EU and its Member States acting jointly. While the UK continues to be bound by the obligations stemming from those agreements, at the same time it regains the power to 'sign and ratify international agreements in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union' (Article 129, para 4).

From a trade perspective, the UK would remain part of the EU's common commercial policy until the end of the transition period and would still implement the EU's common external tariff, including preferential tariffs under the more than 40 FTAs that the EU has concluded. As indicated in a footnote at Article 129, '[t]he Union will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements'. This approach is however problematic from an international treaty law perspective. Since the UK participation to the FTAs is a direct consequence of EU membership, the change of status after its withdrawal eliminates the international obligation of the FTA partners to extend the market access to the UK even if the UK is treated by the EU as if it were still a member for the purpose of application of EU regulations. The notification of the EU to its partners sounds more like an invitation to these countries to go on treating the UK as a EU member in the absence of any strict obligation for the partner countries to do so.<sup>38</sup> Their acceptance of the partner countries may also be

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<sup>38</sup> Extending the territorial scope of application of a treaty to a third state needs the consent of all the parties to a treaty. The general rule regarding the amendments of a treaty requires the agreement between the parties (Vienna Convention on the Law of Treaties, Art 39) and the creation of rights and obligations for a third states needs the consent of the third state and the parties of the treaty (Arts 34, 35 and 36). The UK Government considered necessary an agreement of the parties 'to interpret relevant terms in these international agreements, such as "European Union" or "EU Member State", to include the UK [...] The key requirement would be the clear agreement of the parties that the underlying treaty continued to apply to the UK during the implementation period'. UK Government, Technical Note on international Agreements during the Implementation Period (8 February 2018) <<https://www.gov.uk/government/publications/technical-note-on-international-agreements>> accessed 21 August 2019.

tacit.<sup>39</sup>

The most controversial part of the Withdrawal Agreement is the one addressing the Irish border. The Irish border question concerns the resolution of two conflicting aspirations: preserving the integrity of the Good Friday agreement,<sup>40</sup> implying an open border between the UK and the Republic of Ireland, on one side; and satisfying the UK 'red-lines' of ending the single market principles on free movement, leaving the EU's customs union, and not having a separate regime for Northern Ireland in respect of the rest of the UK, on the other.

The Irish border question is defined in Protocol 2 to the Withdrawal Agreement, which together with its ten Annexes accounts for 173 of the 585 pages of the Withdrawal Agreement. The Protocol sets out the so-called 'backstop' solution for avoiding a hard border between Ireland and Northern Ireland. In principle, the solution to the Irish border question is devolved to the future EU-UK arrangement negotiated under the Political Declaration. However, if the EU and UK fail to agree a solution by the time the transition period expires the 'backstop' would come into place. The core of this solution is the establishment of an 'ambitious customs arrangements' that would 'build on the single customs territory'.<sup>41</sup> The backstop means substantially that the whole UK would remain in a customs union with the EU.<sup>42</sup>

This single customs territory between the UK and the EU entails the movement of goods on a duty and quota-free basis, with low levels of administrative obligation at the border, and a deep level of integration

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<sup>39</sup> On these issues before the negotiations started see Giorgio Sacerdoti, 'The Prospects: The UK Trade Regime with the EU and the World – Options and Constraints Post- Brexit' in Federico Fabbrini (ed) *The Law & Politics of Brexit* (Oxford University Press 2017) 72-91.

<sup>40</sup> See contribution by John Doyle & Eileen Connelly in this volume.

<sup>41</sup> According to the Preamble of the Protocol, 'The Union and the United Kingdom [...] HAVING REGARD to the Union's and to the United Kingdom's common objective of a close future relationship, which will establish ambitious customs arrangements that build on the single customs territory provided for in this Protocol, in full respect of their respective legal orders'.

<sup>42</sup> Joseph Weiler, 'A Frontstop Approach to the Backstop Conundrum' (EJIL: Talk!, 29 January 2019) <[www.ejiltalk.org/a-frontstop-approach-to-the-backstop-conundrum/](http://www.ejiltalk.org/a-frontstop-approach-to-the-backstop-conundrum/)> accessed 3 May 2019.



between the UK and the EU, particularly with respect to Northern Ireland.<sup>43</sup> Article 6 of Protocol 2 stipulates that a very large part of EU law, as defined in Annex 5, shall apply to the single customs territory. Annex 5, which runs close to 70 pages, is a list of the EU legislation on general matters, such as trade and customs, or the marketing of products, and specific matters, from animal health, to food safety, to motor vehicles to chemicals and pesticides. All these rules should be applied together with Articles 30 and 110 TFEU 'to and in the United Kingdom in respect of Northern Ireland'. Other annexes deal with harmonisations of the UK commercial policy with that of the EU, commitments on state aid, environmental protection, labour standards, and fair taxation. Services are not covered by the backstop.

In particular, Article 3 of Annex 2, under the title 'Customs Tariff applicable to trade with third countries', provides that the UK shall align the tariffs and rules applicable in its customs territory with the Union's Common Customs Tariff, the Union's rules on the origin of goods and the Union's rules on the value of goods for customs purposes. Alignment means for the UK to implement the EU External Tariff without any voice in the related decision making process.<sup>44</sup> The UK is, in fact, prevented from applying to its customs territory a customs tariff which is lower than the Common Customs Tariff, or from applying or granting in its customs territory tariff preferences on the basis of different rules of origin or from applying or granting in its customs territory any quotas, tariff-rate quotas or duty suspensions.

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<sup>43</sup> The commitment of the UK Government to preserving the integrity of the UK's internal market by avoiding different regulatory regimes between Northern Ireland and the rest of the United Kingdom excluded a customs union solution only for Northern Ireland. Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, para 50, <[https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf)> accessed 22 August 2019.

<sup>44</sup> According to Art. 3.3 of the Annex, 'The United Kingdom shall be informed of any decision taken by the Union to amend the Common Customs Tariff, to suspend or reintroduce duties and any decision concerning quotas, tariff-rate quotas or duty suspensions in sufficient time for it to align itself with that decision. If necessary, consultations may be held in the Joint Committee.'

The EU's Common Customs Tariff, combined with the free circulation of goods in the single customs territory, implies that the UK must also grant free circulation to the goods from third countries which are in free circulation in the EU. This would undermine the leverage of the UK in negotiating wider free trade agreements with partners having already free access to its market of goods. This replicates the same limitations Turkey is facing, due to its participation in a customs union with the EU.<sup>45</sup>

The Irish backstop has proved one of the most contemptuous issues blocking the acceptance of the Withdrawal Agreement by the UK Parliament. In the absence of a different solution under the backstop, the UK will be prevented from having its own independent trade policy, one of the main objectives of Brexit.<sup>46</sup> The automatic application of the backstop, in the case of the parties failing to finalize an agreement on the future relationship by 31 December 2020, means for the UK the definitive abdication of the ambition of an independent trade policy.

##### *5. The future trade regime and the Political Declaration*

The Political Declaration is a non-binding statement of intent framing the future relationship between the EU and the UK.<sup>47</sup> The framework of a future relationship, which according to Article 50 TEU should have been taken into account during the withdrawal process, in the Brexit case arrived only at the end of the negotiation when the terms of separation had already been settled and transposed in a draft international treaty. Non-alignment between the assessment of the past and the scheme of future relations is the product of both parties' conduct: the EU's for demanding that negotiations on the future relationship start only once the UK had left the Union, and the UK's for lacking a clear vision on the kind of relationship it wished to build with

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<sup>45</sup> For an updated presentation for these issues see Ovádek, Willemyns et al (n 21) 376.

<sup>46</sup> Letter of Prime Minister Boris Johnson to European Council President Donald Tusk (19 August 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/826166/20190819\\_PM\\_letter\\_to\\_His\\_Excellency\\_Mr\\_Donald\\_Tusk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826166/20190819_PM_letter_to_His_Excellency_Mr_Donald_Tusk.pdf)> accessed 6 September 2019.

<sup>47</sup> Article 50 TUE procedure introduce a general duty to negotiate. See Opinion of AG Campos Sánchez-Bordona, *Wightman v Secretary of State for Exiting the European Union*, [2018] ECLI: EU:C:2018:978, para 97.

the Union after its exit. The 'structural limitation in the Article 50 procedure' allowed this outcome.<sup>48</sup>

The negotiation of a trade deal replacing the participation of a WTO member in a customs union is something new in the realm of FTAs. The starting point of every negotiation of a trade deal are the existing WTO commitments of the parties involved, intending to build within the framework of Article XXIV GATT a closer integration between their economies. The standard objective is the elimination of duties and other restrictive regulations of trade in goods<sup>49</sup> and possibly an extension of the free trade area to services, and various other matters (investment, competition policy, intellectual property and so forth). In the case of Brexit, the situation is reversed: the starting point is that both parties participate in a customs union and the EU's single market, the deepest form of economic integration between sovereign states in existence. The negotiations between the EU and the UK are aimed at reducing the current level of full liberalisation, reintroducing barriers to trade.

The Political Declaration on trade in goods has, however, not solved the tension between the aspirations of the UK to run an independent trade policy and avoid border checks on UK-EU trade, and the aspirations of the EU to preserve the unity of its customs territory and the integrity of the Good Friday agreement.

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<sup>48</sup> Kenneth Armstrong, 'An 'Implementation Protocol' to Unblock the Brexit Process: A Proposal for a Legal Bridge between a Revised Political Declaration and the Withdrawal Agreement' (2019) University of Cambridge Faculty of Law Research Paper No. 9/2019 <<https://ssrn.com/abstract=3336966>> accessed 5 September 2019.

<sup>49</sup> Art. XXIV (8) GATT allows customs unions and free trade areas only when duties and other restrictive regulations of commerce are eliminated on 'substantially all the trade' in goods originating in the territories of the parties. 'One concerns the meaning of the term "substantially all the trade" on which barriers between the parties must be eliminated. In purely quantitative terms, many earlier regional trade agreements liberalized as little as 70–80 per cent of trade; more recent agreements liberalize around 90–95 per cent of trade. There has never been an agreement on the volume of trade that must be liberalized under WTO rules.'; Lorand Bartels, 'Regional Trade Agreements' (2013) Max Planck Encyclopaedia of Public International Law [MPEPIL].

The binding and default trade arrangements set out in the backstop provisions of the Withdrawal Agreement heavily shaped the terms of the political declaration. As it results from paragraph 23 of the Political Declaration on tariffs:

The economic partnership should ensure no tariffs, fees, charges or quantitative restrictions across all sectors, with ambitious customs arrangements that, in line with the Parties' objectives and principles above, build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin.

While trade in goods has been prominent in the UK political debate concerning the future relations with the Union, the less debated future regulation of trade of services will affect much more the UK economy, since services account for nearly 80 per cent of the UK's GDP.<sup>50</sup> The Political Declaration, following the UK position manifested in the Chequers Plan, adopts the downgrading from the single market model to a model of service liberalisation closer to the GATS, including the full sector coverage opposed to the selective approach proposed by the UK. The Political Declaration states that the future deal

should include provisions on market access and national treatment under host state rules for the Parties' service providers and investors, as well as address performance requirements imposed on investors. This would ensure that the Parties' services providers and investors are treated in a non-discriminatory manner, including with regard to establishment.<sup>51</sup>

The baseline of negotiations seems to be the EU Most Favoured Nation (MFN) level of market access and national treatment according to GATS.

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<sup>50</sup> 'Services are the sector that account for the largest part of the economy – in 2017, they accounted for 79% of economic output, the production sector for 14%, construction for 6% and agriculture for 1%', House of Commons Library, Research briefing, Components of GDP: Key Economic Indicators (10 April 2019). In 2017 services accounted for 45 per cent of total UK exports, £277 billion. The EU received 40 per cent of British services exports, the highest proportion of any UK trading partner. Unlike goods, where it runs a deficit, the UK ran a total trade surplus in services of £112 billion. Office of National Statistics (ONS), UK balance of payments, *The Pink Book*: 2018.

<sup>51</sup> Political Declaration (n 17) para 31.

The need for an explicit reference to the establishment of service providers and investors is a consequence of the end of the free movement of persons. In addition, the temporary entry and stay of natural persons for business purposes, in defined areas, would be part of the service arrangements.<sup>52</sup>

As is well known, the main barriers to the liberalisation of services are regulatory. Unlike the free movement of goods, the EU single market for services is not completely realized and regulatory barriers persist in the EU.<sup>53</sup> The light regime of 'voluntary regulatory cooperation in areas of mutual interest, including exchange of information and sharing of best practice' delineated by the Declaration is going to expose UK service providers operating in the EU market to Member States' regulatory barriers. These are illegal within the single market, and the UK will be left without the judicial protection EU citizens and businesses enjoy in case of violation of EU law.

A specific section concerns the financial services trade. The best outcome to be expected is market access based on reciprocal 'equivalence'. From an EU perspective, equivalence means that access to the internal market is admitted only for third country firms complying with their national rules that are deemed 'equivalent' to EU rules. The European Commission unilaterally, discretionally and constantly reviews the equivalence decisions. Of course, this will be the same for the UK, but the cost for London-based financial actors to lose free access to the EU27 market is much higher than the cost for the EU financial firms to lose free access to the UK market.<sup>54</sup>

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<sup>52</sup> Ibid para 32.

<sup>53</sup> Panagiotis Delimatsis, 'From Sacchi to Uber: 60 years of Services Liberalization, Ten Years of the Services Directive in the EU' (2018) 37 YEL 192.

<sup>54</sup> Michaela Hohlmeier and Christian Fahrholz, 'The Impact of Brexit on Financial Markets—Taking Stock' (2018) 6(3) Int J Financial Stud 65: 'Around 8000 financial companies from the EU27 Member States use EU passports for their activities in the UK and just under 23,500 EU passports for their financial services and products (Financial Conduct Authority 2016). In the opposite direction, 5500 British companies use EU passports for their activities in EU27 countries and around 335,000 EU passports for their financial services and products.'

### *6. What next? Options for the UK and the EU in an orderly exit scenario*

Although the UK Parliament has rejected the Withdrawal Agreement negotiated by the Government, also the option of leaving the EU without a deal has been ruled out.<sup>55</sup> Since the EU27 has ruled out (at least as per the end of September 2019) the option of reopening negotiations on the Withdrawal Agreement,<sup>56</sup> the three most likely scenarios are the following:

- 1) The UK Parliament approves the Withdrawal Agreement as it is (maybe after another short extension) and negotiations for the future trade agreement begins once the UK ceases to be an EU Member State;
- 2) The UK and the EU agree on a further long Article 50 extension and on continuing the UK's EU membership until an acceptable alternative to the backstop will be in place to meet the shared UK-EU objective of preventing a hard border returning between Northern Ireland and Ireland; or
- 3) The UK withdraws by default without a deal, as nothing else is agreed – so-called 'hard Brexit'.

In any scenario, it is crucial for the UK to adopt a clear approach to the future trade relations with the EU. The Political Declaration is a compromise between the UK approach to innovative form of cooperation and the EU preference to pattern future relations with the UK on existing FTA models. Such models are offered by the recently negotiated agreement between the EU and Canada (CETA) and by the European third countries-style relationship, such as the European Economic Area (EEA) which brings together the EU, Norway, Iceland and Lichtenstein. The reference in the Political Declaration to the ending of free movement of people between the UK and EU and the development of an independent trade policy for the UK are non-binding and the UK and EU could move beyond these parameters in a future agreement.

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<sup>55</sup> For a detailed account of the UK Parliament votes on the withdrawal agreement and alternatives options, see House of Commons Library, Briefing Paper, 'Brexit: Proposals for the future UK-EU relationship', 08483, (17 April 2019) 10-19.

<sup>56</sup> European Council (Art 50) Conclusion (April 10, 2019), EUCO XT 20015/19.

In fact, the House of Commons debate on the future relationship with the EU covered a wider range of options, including the customs union and EEA single market membership. These are, however, incompatible with the statements in the Political Declaration. The Parliamentary debate did not lead to a majority on one specific model to pursue in the negotiation on the new trade agreement with the EU,<sup>57</sup> leaving all the viable options open.

The so-called 'Canada model' is the option nearest to the framework designed by the Political Declaration. The baseline is given by the WTO commitments and the process is intended to deliver additional liberalisation of the market on a sector-by-sector approach. For trade in goods, this kind of agreements eliminates existing tariffs on industrial products in general, but the agricultural and food market liberalisation is more limited. Differentiations in goods treatment compels border controls. In trade in services, the extent of liberalisation is even more limited than for trade in goods. CETA, for example, does not involve commitments that really go beyond the WTO baseline, being limited to 'binding the actual level of liberalisation in the open economies of Canada and the EU.'<sup>58</sup>

What should be the starting point for negotiations of an FTA between the EU and the UK? The current deep level of integration resulting from UK membership of the single market will be subject to a reverse-liberalisation process. The negotiations will necessarily result in a reduction of the actual level of market access for goods and services and the existing level of deregulation and regulatory alignment. The Canada model would allow the UK to develop its own trade policy, but reducing integration with the EU risks weakening the UK economy, especially due to the loss of unimpeded access to the European internal market. Even if it were able to conclude FTAs with its other major trade partners promptly, it is not clear whether the UK would be able to compensate for the economic disadvantage deriving from leaving the single market, especially if this would happen without a custom union or a strong FTA with the EU.

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<sup>57</sup> On the indicatives votes of Commons on the future relationships, see (n 55) 16.

<sup>58</sup> European Commission (Directorate-General for Trade), 'The Economic Impact of the Comprehensive Economic and Trade Agreement (CETA)', Luxembourg (2017) 22.



In any case, a Canada-type deal between the UK and the EU would imply border checks and customs controls at the Ireland-Northern Ireland border. Thus, such a solution would not be compatible with the backstop between the EU and the UK as envisaged by Article 2 of the Protocol on Ireland/Northern Ireland. In view of the refusal of the UK Government to accept Northern Ireland remaining in a common regulatory area for goods and customs with the rest of the EU, other types of partnership have been discussed.

The first one is the so-called 'Turkey model', based on a customs union which covers industrial goods but excludes agriculture.<sup>59</sup> This regime creates an 'asymmetrical' relationship since the EU's external tariff is extended to Turkey; when the EU enters into a trade deal, Turkey automatically opens its goods market to the third country, without benefitting from preferential access in return.<sup>60</sup> The current model of customs union could be upgraded in a 'Turkey plus' in which the UK and the EU would negotiate together the new trade agreements with third countries. It would be difficult for the EU to accept such a solution because it would grant to the UK a veto power or a conditional say on trade deals that EU Member States do not enjoy. This is because the EU customs union is an area of exclusive competence (Article 3 TFEU) and for the negotiation and conclusion of such agreements, the Council decides by qualified majority (Article 207, paragraph 4). In any case, a customs union, even in an upgraded version of the current Turkey model, would prevent the UK from pursuing an autonomous and independent trade policy.

The backstop impasse has revived one of the first options supported by the EU: the 'Norway scenario'.<sup>61</sup> This is the softer EU exit solution because the UK, becoming part of the EEA or in a similar agreement, would remain in the EU single market but at the same time would manage its own external trade

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<sup>59</sup> Steve Peers, 'Living in the Sin: Legal Integration under the EC-Turkey CU' (1996) EJIL 411.

<sup>60</sup> Ç Nas and Y Özer, *Turkey and EU Integration: Achievements and Obstacles* (Routledge 2017), especially Chapter 2.

<sup>61</sup> The Common Market 2.0 cross party MP's Group, A Brexit deal everyone can support (March 2019) <<http://betterbrexit.org.uk/wp-content/uploads/2019/03/Common-Market-2.0.pdf>> accessed on 18 June 2019.

relations. The EU's common external tariff would not apply to the UK and the UK would be free to negotiate its own FTAs and economic partnerships. The Norway solution would have the merit to maintain UK access to the EU market of services, and a commitment to free movement would enable the process of keeping a soft border between Northern Ireland and the Irish Republic. Being part of the single market would prevent all the regulatory controls, and the border controls would be limited to customs – unless the UK decides to include a customs union with the EU – so-called 'Norway plus'. Moreover, the adoption of a tested model through an existing multilateral treaty would accelerate the negotiation, reducing the length of any kind of transition.

On the other hand, the Norway model is the less popular among Brexiteers because it entails free movement of people and high levels of integration with the EU, especially on the regulatory side. Indeed, EEA membership involves implementation of EU rules relating to the single market without any decision-making role in their formation for the associated countries. Not to mention the financial contribution to the EU required from the EEA members.

### III. WTO RULES AND THE UK'S INTERNATIONAL TRADE RELATIONS FRAMEWORK POST-BREXIT

#### *I. Trade with the EU in case of no-deal*

In case of a no-deal the UK would immediately, upon exit from the EU, be subject to all WTO rules as a full 'independent' member of the Organisation. The WTO regime that would govern the UK-EU trade relations would be the same as the one that will be generally applicable between the UK and the rest of the world post-Brexit, until an FTA of a sort would be agreed.

This is in sharp contrast with the current situation. As between the UK and the rest of the EU, the WTO multilateral rules are currently inapplicable because the EU Member States are part of the customs union governed by EU law in conformity with Art. XXIV GATT. In respect of the EU, the UK situation post-Brexit in this case would be similar to that of any other WTO member which has no trade agreement in place with the EU. The EU custom tariff, according to its list of commitments ('schedule') at the WTO, would

apply as UK custom tariff to UK exports to the EU (and vice versa) and to any other WTO member.<sup>62</sup> This is the MFN tariff applicable to exports into the EU from any member of the WTO with which the EU has no comprehensive trade agreement, such is the case currently in respect of the USA, Australia or New Zealand.

The UK may not unilaterally apply a zero-tariff on imports from the EU (as it has hastily been suggested by some non-experts) without extending such a regime to all other WTO members in compliance with the MFN principle.<sup>63</sup> All other WTO disciplines, such as the WTO Agreement on Anti-Dumping, the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS), would apply reciprocally between the UK and the EU in the absence of specific bilateral agreements in this respect. The EU would be able to levy anti-dumping and countervailing duties against UK exports sold at less than their "normal" value or subsidized, applying the rules and procedures of its anti-dumping and anti-subsidy regulations. The UK could do the same once it has established an anti-dumping authority able to perform anti-dumping and countervailing investigations in compliance with WTO rules.

As to imports, the UK will apply its post-Brexit trade policy, custom regulation and custom duties (tariffs) to imports from the EU at the initially applicable rate. This will in fact be the one set by the EU, as the UK has – for obvious practical reasons – decided to initially apply as its own the regime currently in force for it as a member of the EU.<sup>64</sup>

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<sup>62</sup> The average tariff is estimated to amount to 4-5 per cent ad valorem on average on industrial goods: WTO, ITC and UNCTAD, 'World Tariff Profiles 2018 – Applied MFN tariffs' <[https://www.wto.org/english/res\\_e/booksp\\_e/tariff\\_profiles18\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/tariff_profiles18_e.pdf)> 81, accessed 23 May 2019.

<sup>63</sup> See Stuart Harbinson, 'Leaving On WTO Terms' – Lifting Some Of The Fog', UK Trade Forum (9 February 2019) <<https://uktradeforum.net/2019/02/09/>> accessed 23 May 2019; answering to Global Britain & Labour Leave, '30 Truths about leaving on WTO terms' (9 February 2019) <<https://globalbritain.co.uk/wp-content/uploads/2019/01/GBLL-paper-30-Truths-Final-05.01.19.pdf>> accessed 23 May 2019.

<sup>64</sup> See Joint letter from the EU and the UK Permanent Representatives to the WTO, 11 October 2017 <[https://ec.europa.eu/commission/publications/joint-letter-eu-and-uk-permanent-representatives-wto\\_en](https://ec.europa.eu/commission/publications/joint-letter-eu-and-uk-permanent-representatives-wto_en)> accessed 23 May 2019. On 24 July

*2. UK Trade with non-EU countries under the WTO post-Transition Period or in case of no-deal*

It should be recalled that the UK, which was an original contracting party of the GATT in 1947, is also an original member of the WTO, as is the EU in its own right, by virtue of both the WTO Agreement and EU law. The WTO Agreement, comprising the agreement establishing the WTO and the various multilateral and plurilateral agreements annexed to it, have been concluded and ratified as 'mixed agreements', that is, also by all the individual members of the EU. There is thus no issue of state succession, nor any need for admission of the UK as an individual member of the international organization.<sup>65</sup> The UK was, is and remains a member of the WTO so that the EU schedule, which is also currently the UK's schedule, remains its schedule.

The UK will be able to act, from the day that Brexit is effective, as a full-fledged WTO member, participating in its bodies, in any negotiations (with the limits of being part of a custom union with the EU or other WTO members, should this be the case), and as a party in dispute settlement proceedings. However, should the Withdrawal Agreement ultimately be agreed and enter into force, during the Transition Period the UK's ability to negotiate tariff deals ('concessions') will be limited by the fact that it will still be part of the EU custom union. The UK will also be able to participate in other negotiations. The UK has immediately seized this opportunity by negotiating its accession to the plurilateral Government Procurement Agreement (GPA), in which the UK participates currently as a member of the EU. As agreed on 27 November 2018 with its other 18 members (not counting the EU and its Member States), the UK has replicated its current

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2018 the UK submitted its goods schedule for certification at the WTO and on 3 December 2018 the UK completed the same step for its services schedule. The schedules were published on 7 December 2018 at <<https://www.gov.uk/government/publications/uk-goods-and-services-schedules-at-the-wto>> accessed 23 May 2019. 'The schedule seeks to replicate UK's existing commitments under the GATS and gives overseas businesses the same level of guaranteed access to the UK service sector as they currently have.' UK Government, Press release (3 December 2018) <<https://www.gov.uk/government/news/liam-fox-submits-services-schedule-to-wto>> accessed 23 May 2019.

<sup>65</sup> Sacerdoti (n 39) 82.

market access coverage under the EU schedule with minor technical adjustments, effective at the end of the transition period.<sup>66</sup>

As mentioned above, initially the UK custom regime and specifically the custom duties will be those applying under the EU Common Custom tariff at exit day or at the end of the transition period. The UK will of course be free to change it – and intends to do so – in the absence of a custom union with the EU, at the end of the transition period or after the end of the backstop. The Trade Bill, introduced on 7 November 2017, represents a significant step in preparing to leave the EU. It aims at putting in place essential legal powers and structures to enable the UK to operate an independent trade policy. The Taxation (Cross-border Trade) Act, which received Royal Assent on 13 September 2018, establishes a standalone customs regime and ensures that VAT and excise arrangements operate effectively upon EU exit. It also contains trade-related tax measures.

In theory, other WTO members should not be able to object to having the EU (EU28) split between the EU27 and the UK since, in principle, this would not affect negatively the original, previous balance of benefits and obligations. Establishing a new WTO schedule would entail instead a painstaking process of negotiations, which would not necessarily lead to replicating the EU schedule, especially if the UK aimed to obtain more concessions from other members than those reflected in the schedule in force (or vice-versa).<sup>67</sup>

This approach has been expressed in the joint UK and EU letter of 11 October 2017, where it states:

Specifically, the EU and UK intend to maintain the existing levels of market access available to other WTO Members. To this end, we intend that the future EU's (excluding the UK) and the UK's (outside the EU) quantitative commitments in the form of tariff-rate quotas be obtained through an

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<sup>66</sup> 'UK set to become a party to the Government Procurement Agreement in its own right' ([www.wto.org](http://www.wto.org), 27 February 2019) <[www.wto.org/english/news\\_e/news19\\_e/gpro\\_27febr19\\_e.htm](http://www.wto.org/english/news_e/news19_e/gpro_27febr19_e.htm), accessed 5 September 2019> accessed 6 September 2019.

<sup>67</sup> See Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices (WTO Internal Only)* (Cambridge University Press 2018).

apportionment of the EU's existing commitments, based on trade flows under each tariff-rate quota.<sup>68</sup>

However, the EU/UK proposal has been met with some opposition at the WTO. Individual countries have considered that an apportionment of existing commitments even if based on actual trade flows data would cause them prejudice.<sup>69</sup> The most complex issue, which is clearly addressed by the EU and the UK in their joint letter, is the apportionment between the EU and the UK of the EU tariff rate quotas (TRQs) in force with many suppliers of agricultural products. The UK and the EU have agreed to split the existing quotas on the basis of the UK's share of the total EU imports of each product under the TRQs over a recent three-year period. The putting into force of the new TRQs, however, needs in principle the agreement of the beneficiaries, following completion of negotiations with WTO members having a principal or substantial supplying interest in relation to each tariff rate quotas under Article XXVIII GATT. Most of these members have objected on various grounds, arguing that their access to the henceforth-separate UK market would be diminished and challenging the three-year period basis chosen by the EU and the UK.<sup>70</sup> In fact different WTO members currently benefiting from a given EU TRQs may have – and do have

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<sup>68</sup> Joint letter to the WTO (n 64).

<sup>69</sup> 'While the US is supportive of the UK establishing itself as an independent member of the WTO, it will not accept an EU-UK approach to TRQs that is prejudicial to our existing rights' the USA said at the WTO Council for Trade in Goods meeting this week, according to a Geneva-based trade official. 'The current approach to Brexit TRQ negotiations is unacceptable and we are eager to engage [with the EU] to ensure our rights are maintained'; Hannah Monicken, 'U.S. and others urge UK, EU to address TRQs during Brexit extension', *Inside U.S. Trade*, Washington (19 April 2019).

<sup>70</sup> In the WTO Council for Trade on Goods on 12 November 2018 more than 20 countries registered their objections on the EU-UK joint proposal, see for a summary <[https://www.wto.org/english/news\\_e/news18\\_e/good\\_12nov18\\_e.htm](https://www.wto.org/english/news_e/news18_e/good_12nov18_e.htm)> accessed 23 May 2019. Similar objections had been voiced at the WTO Market Access Committee held in October 2018 by the U.S., Russia, Australia, Japan, China and Canada, that are almost all major agricultural exporters, see for a summary <[https://www.wto.org/english/news\\_e/news18\\_e/mark\\_11oct18\\_e.htm](https://www.wto.org/english/news_e/news18_e/mark_11oct18_e.htm)> accessed 23 May 2019.

– a different interest towards the EU27 and the UK markets, depending upon their established trade flows and commercial relations.

In view of these difficulties, the EU has therefore decided to proceed unilaterally for the time being, adopting on 30 January 2019 an ad hoc Regulation based on the abovementioned principles.<sup>71</sup> The EU remains committed to continue to negotiate at the WTO in order to reach satisfactory agreements using the delegation granted to the Commission in Regulation 2019/216 to amend the TRQs this context.<sup>72</sup>

### *3. UK agreements with WTO members post-Brexit*

It is accepted that when EU law ceases to apply to the UK, deal or no-deal, the UK will not be able to remain a member in its own right of any EU FTA or other similar trade agreement currently applicable to the UK as an EU member whose territory is part of the EU custom territory to which such agreements apply.<sup>73</sup> The bilateral FTAs and similar 'Partnership' agreements currently applicable to the UK could not become trilateral and cover the UK after it has ceased to be a EU member and its territory is no more 'equated' to that of the EU, as during the Transition period under Article 129 of the Withdrawal Agreement discussed in the next paragraph. The EU Commission has officially informed interested parties that 'as of the withdrawal date, the EU preferential trade agreements with third countries in the field of the common commercial policy and customs no longer apply to the UK'.<sup>74</sup>

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<sup>71</sup> Regulation (EU) 2019/216 on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union, and amending Council Regulation (EC) No 32/2000, [2019] OJ L38.

<sup>72</sup> WTO Committee on Agriculture (26-27 February 2019), for a summary of the meeting see <[https://www.wto.org/english/news\\_e/news19\\_e/agcom\\_06mar19\\_e.htm](https://www.wto.org/english/news_e/news19_e/agcom_06mar19_e.htm)> accessed 23 May 2019.

<sup>73</sup> Sacerdoti (n 39) 81.

<sup>74</sup> See European Commission, 'Notice to Stakeholders. Withdrawal of the UK and the EU Rules in the field of customs and external trade, Preferential rules of origin' (4 June 2018) <[http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc\\_156913.pdf](http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156913.pdf)> accessed 23 May 2019.



One must distinguish the transition period, if any, from the subsequent period in time when the UK would not be part of any customs union with the EU (except if the backstop would enter fully into force). As mentioned above, in this period the UK will not be a member of the EU anymore. However, it will maintain a single custom union with the EU. In view of the peculiar features of this arrangement one could say that the EU custom territory to which EU FTAs and similar agreements are applicable will still include the UK. The issue has been resolved, at least in the bilateral relations, by Article 129 of the Withdrawal Agreement:

during the transition period, the UK shall be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf or by the Union and its Member States acting jointly.

This requires that the other parties agree to consider the UK as still belonging to the territory to which the agreement applies. However, as mentioned above, any third country could challenge this framework and decide not to go on applying the current agreements with the EU to the UK.<sup>75</sup> Should this be the case, EU FTA partner countries may consider UK goods (or even EU goods having UK content) not qualifying any more as having EU preferential origin. UK inputs incorporated in goods obtained in third countries with which the EU has a preferential trade arrangement and imported in the EU will be 'non-originating' with the effect that the whole product may not qualify in the EU as having a preferential origin.<sup>76</sup>

The UK is seeking to establish links with major economies to replace the FTAs covering a sizeable share of its non-EU international trade and has been negotiating with a host of third countries starting in 2018-2019. The EU participates in around 40 FTAs with over 70 countries. According to UK Government, '[i]n 2017, ONS [Office for National Statistics] data showed that trade with third countries with EU free trade agreements accounted for around 12 [per cent] of the UK's total trade.'<sup>77</sup> Since these agreements provide

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<sup>75</sup> See para 2.4.

<sup>76</sup> European Commission (n 74).

<sup>77</sup> Guidance of the Department of International Trade and others on 'Existing trade agreements if the UK leaves the EU with no deal' (19 December 2018) <<https://www.gov.uk/government/publications/existing-free-trade-agreements-if->

benefits to businesses, consumers and investors in terms of reductions in import tariff rates and regulatory requirements for goods, access to the service market and to public procurement and protection for intellectual property, the strategy of the UK Government is to seek to replicate EU trade agreements to ensure continuity to UK business to trade on preferential terms after the withdrawal.<sup>78</sup> Not all of the EU's trade partners have, as yet, accepted to enter in the roll-over agreements.<sup>79</sup> In any case the concluded agreements are transitional towards new trade deals to be negotiated when the UK's partnership with the EU is decided and the UK negotiation leverage assessed.<sup>80</sup>

In relation to the post-transition period there are two further issues to be discussed. First, such agreements can enter into force only starting from the day when the UK will not be bound in a custom union with the EU as provided by the single EU-UK custom area during the transition period.<sup>81</sup> If this regime will go on due to the entry into force of the backstop, this deadline will be postponed accordingly. Secondly, prospective candidates to negotiations need to know what kind of FTA, if any, the UK will conclude with the EU before being in a position of engaging in such negotiations. 'Rolling-over' the present regime under the EU FTAs seems a quick solution in respect of countries with which the UK has currently FTAs in place as a member of the EU, but several of those governments have signalled that a permanent agreement will require renegotiation and more concessions from

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theres-no-brexit-deal/existing-free-trade-agreements-if-theres-no-brexit-deal> accessed 23 May 2019.

<sup>78</sup> Ibid.

<sup>79</sup> For the list of the Trade Agreements signed by UK see Guidance of the Department of International Trade and others on 'Existing trade agreements if the UK leaves the EU with no deal' (22 August 2019) available at <<https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries-in-a-no-deal-brexit>> accessed on 6 September 2019.

<sup>80</sup> See article 8 of the Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation (11 February 2019).

<sup>81</sup> See Art 129.4: 'during the transition period, the UK may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorized by the Union'.

the UK.<sup>82</sup> In fact, the negotiating weight of the UK is not comparable to that of the EU.

It is no surprise, therefore, that in principle only two agreements have so-far been reached with important partners, namely Switzerland and Israel.<sup>83</sup> They are two countries that have important links with the EU but at the same time face periodic problems in streamlining their relations with this "big brother". This is a fate that may be similar to the one awaiting the UK. In case of a no-deal scenario, UK imports and exports with countries with which the UK has not finalized a trade agreement would be subject to tariff at the current EU MFN rate. The UK also has an interest in negotiating FTAs with countries with which the EU has no agreement, at least not yet, such as the USA, Australia and New Zealand. Notwithstanding this early start, negotiations with the USA, the most important prospective partner, do not look easy. Especially US agricultural sectors have signalled that they expect an easier entry for their products, quotas, tariffs and standards than has been the case until now with the EU.<sup>84</sup>

#### IV. CONCLUSION

Conclusively, our analysis shows that 'taking back control' and establishing an independent trade policy is not and will not be an easy task for the UK. Above all, the type of relation the UK will establish with the EU impacts on the choices and contents of future trade agreement between the UK and the rest of the world. Even in case of no-deal Brexit, the dominant importance for the UK economy of trade flows towards EU will de facto limit the choices available to the UK in its trade negotiations with the rest of world.

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<sup>82</sup> See the Editorial Board, 'Britain faces a bumpy road ahead at the WTO', *Financial Times* (2 November 2018).

<sup>83</sup> By 22 August 2019 UK had signed twelve trade agreements and the one with South Korea is announced to be agreed in principle. Guidance of the Department of International Trade on 'Existing trade agreements if the UK leaves the EU with no deal' (n 79).

<sup>84</sup> US Trade Representative, 'United States-United Kingdom Negotiations Summary of [US] Specific Negotiating Objectives' (February 2019) <[https://ustr.gov/sites/default/files/Summary\\_of\\_U.S.-UK\\_Negotiating\\_Objectives.pdf](https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf)> accessed 23 May 2019.